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No. 1385

Supreme Court, U.S.
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Supreme Court of the United States

October Term 1970

In the Matter of: TMT TRAILER FERRY, INC., ET AL.

THOMAS J. KIRKLAND, as Trustee for TMT TRAILER FERRY, INC., et al.,

Petitioner,

vs.

PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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MIAMI REVIEW — 371-4853 — 377-3721

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No. _____

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PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, THOMAS J. KIRKLAND[1], as Trustee in reorganization of TMT Trailer Ferry, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, reversing an order entered in a Chapter X bankruptcy reorganization matter[2] by the United States District Court for the Southern District of Florida allowing

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[1]Subsequent to the remand of the instant cause the Chief Judge of the United States District Court for the Southern District of Florida reassigned the matter to the Honorable W. O. Mehrtens, District Judge. C. Gordon Anderson, Trustee, resigned his position which was accepted by the Court on January 10, 1969. Thomas J. Kirkland was appointed successor Trustee and qualified as such on January 13, 1969. His petition for appointment of new counsel was granted by the Court, and Irving M. Wolff [now Irving Mark Wolff, P.A.] was appointed as such. At all times material to these proceedings Judge Mehrtens presided, Mr. Kirkland was Trustee, and Mr. Wolff was attorney for the Trustee.

[2]For background attention is directed to the past history of the matter in this Court. See *Protective Committee for Independent Stockholders of TMT Trailer Ferry v. C. Gordon Anderson, Trustee*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed.2d 1; rehearing denied 391 U.S. 909, 88 S.Ct. 1649, 20 L.Ed.2d 425 (1968).

All of the issued involved in the instant petition are the aftermath of this 1968 opinion filed by this Honorable Court. The issues are new to the litigation, but there appears to be a germaneness because of this Court's observations:

> "Since the committee will, of course, be entitled to participate in the new hearing on valuation and insolvency, the order of the District Court discharging it is vacated. So doing, however, reflects no opinion on the merits of the argument presented in this Court by petitioner as to why it should not have been discharged." [*TMT Trailer Ferry, Inc. v. Anderson*, supra, at 453; 88 S.Ct. 1157, 20 L.Ed.2d 1.]

a partial interim award of fees and reimbursement of expenses to counsel for the Protective Committee of Independent Stockholders of TMT Trailer Ferry, Inc., and denying a motion for the entry of a protective order in discovery proceedings, and further denying the entry of an order for instructions.

In accordance with Rule 23.5, U.S.Sup.Ct.Rules, as amended 1970 [28 U.S.C., Rules, Rule 23.5], the instant petition will be addressed to two consolidated causes since they involve closely related questions.[3]

Opinions Below

United States Court of Appeals for the Fifth Circuit, opinion dated October 27, 1970 (A. 63) is reported at 434 F.2d 804; its denial of the Petition for Rehearing and Rehearing En Banc (A. 71) is reported at 434 F.2d 808.

Jurisdiction

The Opinion of the Court of Appeals for the Fifth Circuit was filed October 27, 1970 (A. 63). Subsequent to the denial of the Petition for Rehearing and Rehearing en Banc (A. 71), the judgment was filed and issued as the appellate court's mandate on December 29, 1970 (A. 72).

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[3]The record in the United States Court of Appeals for the Fifth Circuit reflects the docketing of two separate and distinct appeals [No. 29089 a permissive appeal; No. 29560 classified as an appeal of right]. Both causes were consolidated for argument and disposition. See *In Re TMT Trailer Ferry, Inc., Debtor, Protective Committee v. Kirkland*, 434 F.2d 804, October 27, 1970, rehearing and rehearing en banc denied at 808.

On January 25, 1971 the United States Court of Appeals for the Fifth Circuit recalled its mandate and stayed the same to and including February 24, 1971. (A. 73).

This instant petition is timely filed. [62 Stat. 961; 63 Stat. 104; 28 U.S.C. § 2101c and f.]

The jurisdiction of this Court is invoked under § 24c of the Bankruptcy Act; 52 Stat. 854; 62 Stat. 928; 11 U.S.C. § 47c, and 28 U.S.C. § 1254.

QUESTIONS PRESENTED

I.

Whether under Chapter X of the Bankruptcy Act, which provides for an appeal as a matter of right, a United States Court of Appeals can obtain jurisdiction where the notice of appeal is filed out of time.

II.

Whether the appellate court below erroneously curtailed the jurisdiction of the District Court, sitting in a bankruptcy reorganization, so as to preclude the trial court from investigating past and present conduct of parties, seeking interim allowances and reimbursement of costs, thereby severely curtailing the trial court's administrative jurisdiction over the proceedings.

III.

Whether under Chapter X of the Bankruptcy Act, which requires economics of administration and forbids duplication of compensation for the same services rendered by different parties, can counsel for a stockholders committee be allowed an award of fees for duplicating services performed by attorneys for the trustee, the Securities and Exchange Commission, and the United States of America.

IV.

Whether under Chapter X of the Bankruptcy Act, which provides that the Securities and Exchange Commission perform an advisory role, must a reorganization court divest itself of its jurisdiction when it awards partial interim fees and reimbursement for costs to counsel for a stockholders committee, i.e., not to make any award other than that recommended by the Securities and Exchange Commission, even though the agency does not undertake a separate fact-finding investigation, but relies solely upon the record of the cause.

V.

Whether under Chapter X of the Bankruptcy Act, which provides for the allowance of fees to counsel for stockholders committees, must the filed petition contain sufficient detail; must the petitioner prove his claim as to amount sought and right to be paid, or whether said petitioner may proffer evidence without introducing the same by making himself available for cross-examination;

and whether a United States Court of Appeals may become a trier of fact and substitute its own findings for that of the trial court and make allowances by relying solely upon the recommendations of the Securities and Exchange Commission, and the applicant's proffer of evidence and availability for cross-examination.

VI.

Whether or not under Chapter X of the Bankruptcy Act an interlocutory order denying an application for protection in discovery proceedings, and further refusing additional instructions defining the role of a stockholders committee, is an order of such definite finality as to render it appealable.

VII.

Whether under Chapter X of the Bankruptcy Act, which provides for allowances of fees to counsel for stockholders committees, is the statutory requirement of benefit to the estate diluted when the court takes into consideration services not deemed compensable to such counsel under the Act.

VIII.

Whether under Chapter X of the Bankruptcy Act, which provides for an allowance of fees to counsel for a stockholders committee, and the trial court makes a *partial* interim allowance and reimbursement for costs, and further reserves jurisdiction over the parties and the subject matter to finally dispose of the same, is such an order

appealable by the recipient of the award; and if so, what is the basis for appeal, i.e., abuse of discretion, or finding of fact inconsistent with the record.

Statutes, General Orders, Federal Rules of Appellate Procedure and Federal Rules of Civil Procedure Involved

The pertinent portions of the Act of July 1, 1898, c. 541, § 224, 30 Stat. 553; as amended June 22, 1938, c. 575, § 1, et seq., 52 Stat. 854, et seq., subsequently amended, [11 U.S.C. §§47, 93a, 93k, 501 et seq.]; Act of June 25, 1948, c. 646, 62 Stat. 963; as amended May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104 [28 U.S.C. § 2107]; Act of August 26, 1935, c. 687, Title I, § 11, 49 Stat. 820, §§ 11(e), (f); General Order 44 [General Orders in Bankruptcy adopted by the Supreme Court of the United States] [28 U.S.C., Rules, G.O. 44]; Rules 4, 6 and 26, Federal Rules of Appellate Procedure [28 U.S.C., Rules]; Rule 26, Federal Rules of Civil Procedure [28 U.S.C., Rules], are set forth in Appendix hereto at pages A. 163 to A. 189.

Statement

Subsequent to this Honorable Court's decision in 1968[4] the entire matter was remanded to the United States District Court for the Southern District of Florida. The

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Note: When reference hereinafter is made to the Bankruptcy Act, designation will be made to the Section thereof, cross reference to United States Code, and Appendix citation. All other citations will also include reference to the Appendix.

[4]*Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 88 S.Ct. 1157, 20 L.Ed. 2d 1; rehearing denied 391 U.S. 909, 88 S.Ct. 1649, 20 L.Ed.2d 425 (1968).

cause was reassigned as previously noted, to the Honorable William O. Mehrtens, District Judge, by order entered by the Honorable Charles B. Fulton, Chief Judge, United States District Court for the Southern District of Florida, on July 8, 1968.

Proceedings In The Trial Court

Shortly after the return of the cause to the District Court and the reassignment of the matter to Judge Mehrtens, counsel for the Protective Committee for Independent Stockholders [hereinafter referred to as Committee], for and on behalf of said Committee and itself, petitioned the Reorganization Court for an interim award of fees of $100,000.00 and reimbursement of costs of $18,496.44.[5]

Hearing on said application was held on December 27, 1968. After certain creditors moved for the entry of an order requiring counsel for the Committee to file the required statements in compliance with § 210 of the Bankruptcy Act [11 U.S.C.A. § 610 (A. 171)], such a direction was made, and in compliance therewith counsel for the Committee filed the required supplemental statement on February 7, 1969.[6]

The supplement to the statement of attorneys for the Committee reflected not only a substitution of counsel, it

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[5]For the Court's convenience the petition in its entirety is set forth at A. 90 to A. 155, because the contents thereof have severe implications in the appellate proceedings.

[6]Irwin L. Langbein and Malcolm Mason had previously filed their statements under § 210 of the Act on August 5, 1957 (A. 83). At no time prior to February 7, 1969 did Irma Mason file the statement required by § 210 of the Act. However, the supplement to the statement filed February 7, 1969 included Mrs. Mason (A. 158).

also made reference to a change in the secretariat of the Committee.[7]

The supplement to the § 210 statement was filed subsequent to the conclusion of the hearing on the application for interim fees and reimbursements, and contained new matter never before the trial court or alluded to in the hearing on the application for allowances, nor referred to in the petitions seeking the allowances. Among other things the supplement made reference to proceedings instituted in the reorganization litigation by Mrs. Mason on her own behalf and on behalf of a class of stockholders,[8] in which she was represented by counsel for the Committee. The supplement alleged that such representation was with the knowledge and consent of the Committee (A. 161). The gist of Mrs. Mason's petition in the proceedings sought to have her stock claim[9] reclassified as a general unsecured claim.

On January 14, 1969, prior to the filing by counsel for the Committee of its supplemental § 210 statement, the

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[7]During these proceedings Committee counsel insisted that the secretary to the Committee was not a member of the Committee; but in passing it must be observed that though Malcolm Mason retired as secretary and he was replaced by Mrs. Irma Mason his wife, the original statement under § 211 of the Bankruptcy Act [11 U.S.C.A. § 611 (A. 171)] was never amended to reflect this change in personnel.

[8]The sections of the Bankruptcy Act dealing with corporate reorganizations [Chapter X] do not provide for class suits as such.

[9]No proof of stock claim was filed in the proceedings, and the actual filing of the petition was several years subsequent to the bar order of May 4, 1958. [*Protective Committee v. Anderson*, 364 F.2d 936 at 939, 5th Cir. 1968.] The representation of Mrs. Mason by counsel for the Committee was subsequent to Committee's discharge and prior to its restoration. So that there may be no confusion, Irma S. Mason is an attorney seeking interim allowance for fees, and she is the wife of Malcolm S. Mason.

Securities and Exchange Commission recommended an interim allowance of $60,000 and an additional sum of $10,000 as partial reimbursement of expenses.

The Trustee in accordance with his order of appointment filed a Report with the Reorganization Court, and inasmuch as the said Trustee and his counsel did not participate in the hearing involving the fee applications, the Trustee caused the entire record to be meticulously reviewed. In the Trustee's opinion, he reported to the Court that further investigation be had. ¶Thereafter, counsel for the Committee reiterated its request for interim allowance and reimbursement and the Trustee responded thereto. In addition thereto, the Trustee noticed all of the Committee members and its counsel for depositions. An application was made to the trial court for the entry of a protective order and for instructions as to the status of the Committee in the cause.

On October 9, 1969 the Reorganization Court, no doubt feeling that some fees were earned by counsel for the Committee which would not be affected by disqualification, did allow a partial interim fee and partial reimbursement for costs in the sum of $10,000 and $5,000, respectively; reserving jurisdiction over the parties and the subject matter to fully dispose of the application after additional investigation. The order further denied the application for the protective order and the request for instructions as to the status of the Committee in the cause. (A. 13-A. 18).

This application for writ of certiorari does not concern itself with the fourth matter contained in the October 9, 1969 order, to wit: the allowance of fees to the Special Master, since the Court of Appeals for the Fifth Circuit

denied the Committee leave to appeal that portion of the order.

Proceedings In The United States Court of Appeals For The Fifth Circuit

On November 10, 1969 counsel for the Protective Committee filed its Petition for Leave to Appeal the Order of October 9, 1969 to the United States Court of Appeals for the Fifth Circuit (A. 2).

Hereinafter this appeal will be referred to as the permissive appeal. It was subsequently assigned No. 29089 by the Clerk of the Court of Appeals for the Fifth Circuit.

While said application involving the permissive appeal was pending before the appellate court, counsel for the Committee did on November 13, 1969 file a Notice of Appeal in the trial court directed to said Court's Order of October 9, 1969 (A. 50).[10]

On November 15, 1969 the Trustee answered the Petition for Leave to Appeal theretofore filed in the appellate court by the Committee (A. 18).

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[10]Attention is directed to ¶28 of the Petition for Leave to Appeal dated November 8, 1969 (A. 50), where Committee counsel represents that as of that date it is currently appealing the order of October 9, 1969 as a matter of right. This representation is incorrect, and it is apparent that the opinion rendered by the Court of Appeals for the Fifth Circuit on October 27, 1970 relied upon this representation: "' . . . Appeal Two: At the same time, an appeal as of right by the committee was noticed from that part of the order which denied the motion for instructions and protection.'" [Opinion below at 806 (A. 64)]

Hereinafter this will be referred to as the appeal of right, subsequently assigned No. 29560 by the Clerk of the Court of Appeals for the Fifth Circuit.

No reference is made to the pleadings filed by the Securities and Exchange Commission in the proceedings before the United States Court of Appeals for the Fifth Circuit, because said agency supported to a high and concentrated degree the position assumed by counsel for the Stockholders Committee.

On December 12, 1969 the appellate court entered its order granting the Committee leave to appeal that portion of the October 9, 1969 order wherein the District Court allowed partial interim awards and reimbursement for Committee's counsel (A. 51). At this time the Clerk of the Court of Appeals for the Fifth Circuit assigned No. 29089 to the permissive appeal, previously designated as Misc. No. 1546.

On January 15, 1970 in response to a motion by counsel to the Committee, the United States Court of Appeals for the Fifth Circuit clarified its order of December 12, 1969 and denied, without hesitation or confusion, the Committee's seeking of leave to appeal those portions of the District Court's order of October 9, 1969 denying the motion for protection and instructions (A. 53).

On February 5, 1970 counsel for the Trustee obtained from the Clerk of the United States District Court for the Southern District of Florida a Certificate reflecting that the said Committee counsel failed as of that date to file its cost bond on appeal. This Certificate was filed with the appellate court on February 8, 1970 (A. 54).

On February 19, 1970 the appellate court entered its Order directing the now designated Appellants in said

Court to file a cost bond in accordance with Rule 7, F.R.A.P. [28 U.S.C., Rules, Rule 7, Federal Rules of Appellate Procedure], and further warned that a failure to comply with the letter and spirit of the appellate rules in the continued prosecution of the appeal would result in a dismissal. The motion of the Appellee to dismiss was denied (A. 55).

The Trustee filed a motion to dismiss the appeal of right [cause No. 29560] as counsel for the Committee did not prosecute the same in accordance with the applicable appellate rules. Committee counsel responded by filing a motion for extension of time for filing and docketing the said appeal. On March 30, 1970 the appellate court entered an order denying the Trustee's motion to dismiss and granting Committee counsel time to file and docket the appeal, with the warning that if the filing and docketing were not completed within 15 days of the order, the appeal would stand dismissed in accordance with Local Rule 9(b) of the United States Court of Appeals for the Fifth Circuit (A. 56).[11]

On April 9, 1970 [in the permissive appeal proceedings] the appellate court filed an order deferring the Appellant's motion to dispense with appendices until all parties filed their respective briefs, and granted to the Appellants a further extension of time to transmit the record to and including April 15, 1970 (A. 57).

Approximately at this time the appellate court denied the Appellee's motion to dismiss the permissive appeal

[11]As is noted in the Appendix, a clerical error erroneously designated this cause as No. 29089; it should have been designated as No. 29560, as it involved the appeal as of right.

because of the Appellants' failure to comply with the order of the appellate court entered February 19, 1970 (A. 58).

On May 8, 1970 the appellate court denied a motion filed by the Appellee to consolidate the permissive appeal and the appeal of right. It held in abeyance the request of Appellee for oral argument, and denied the Appellee the right to file a brief in excess of 70 pages but not exceeding 100 pages (A. 59).

On May 14, 1970, however, the appellate court ruled on the Appellee's motion for reconsideration of the Court's denial of the previous request for leave to file a brief in excess of 70 pages, and did enter its Order in the permissive appeal allowing the Appellee leave to file a brief limited to 91 pages (A. 60).

In both the permissive appeal and the appeal of right the Securities and Exchange Commission [an appellee] filed reply briefs to the briefs filed by the Appellee Trustee. Strict compliance with the Federal Rules of Appellate Procedure and the Local Rules of the United States Court of Appeals for the Fifth Circuit do not allow this procedure. However, on July 10, 1970 in the permissive appeal (A. 61), and on September 22, 1970 in the appeal of right (A. 62), the appellate court granted leave to the Securities and Exchange Commission to file reply briefs after the fact.

Oral argument was had on September 29, 1970. On October 27, 1970 the appellate court filed its per curiam opinion in the consolidated causes, reversing the trial court (A. 63).

On November 30, 1970 the appellate court entered its order in the consolidated causes allowing the Appellee to file a Motion for Rehearing and Rehearing En Banc out of time (A. 70).

On December 21, 1970, the appellate court entered its order denying the Petition for Rehearing and Rehearing En Banc (A. 71).

On December 29, 1970 the appellate court issued its judgment as a mandate in the consolidated causes (A. 72).

On January 25, 1971 the appellate court in the consolidated causes issued its order recalling its previously issued mandate and staying the same to and including February 24, 1971, allowing the Appellate to prosecute this petiton in the nature of an application for writ of certiorari to this Honorable Court (A. 73).

The foregoing facts and rulings, as contained in the orders and opinion of the United States Court of Appeals for the Fifth Circuit in the consolidated causes involving the permissive appeal and the appeal of right, give rise to this instant application for writ of certiorari to this Honorable Court, so that it may be afforded an opportunity to express its supervisory jurisdiction to correct the apparent errors, misapplications of law creating divergence of opinions amongst the various United States Circuit Courts of Appeals, and finally to express its opinion establishing a uniform application of certain portions of the Bankruptcy Act to be universally applied by the Trial and the appellate courts of the United States of America sitting as Courts of Bankruptcy.

Reasons For Granting The Writ

At the present time there is no clear, consistent, reconcilable basis established by the opinions of the various United States Circuit Courts of Appeals for the allowance of fees and reimbursements of costs to the various committees and their counsel provided for in Chapter X bankruptcy proceedings.

However, this instant application will deal only with the allowances involved to stockholders committees and their counsel.

The law in this field, while simple in its statutory form, is submerged with conflicts and contradictions created by the opinions establishing controlling law in the several appellate circuits. The problem is further compounded by variations within the individual circuits. This condition is sufficient to require this Court to exercise its appellate jurisdiction.

The per curiam opinion below[12] adds another conflict to an already overburdened and contentious background, and is a dangerous embarcation overriding the Congressional enactment to denude a reorganization trial court of its necessary and inherent jurisdiction to control awards of fees and to re-examine said awards at any time, by the substitution of the appellate tribunal as the trier of fact in such matters.

The opinion below further establishes a demarcation that an appellate court may entertain appeals out of time,

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[12]In re *TMT Trailer Ferry, Inc., Debtor, Protective Committee v. Kirkland*, supra [hereinafter referred to as "opinion below"].

thereby involving serious procedural matters interpreting the application of the Federal Rules of Appellate Procedure,[13] never before passed upon by this Court.

The opinion below is an additional step in diminishing and limiting the legislative delegation of jurisdiction to the district courts in Chapter X proceedings in fee matters and substituting therefor, contrary to the Act, an advisory, nonfact-finding administrative body to establish fees with such a finality that the district court, contrary to the provisions of the Act, is precluded from re-examining the recommended award.

Again, the opinion below approves a radical procedure for the application and proof required of counsel for a committee seeking fees and reimbursement of costs. It creates a rule of law providing for the filing of a vague and indefinite application, no requirement of proof by introducing evidence as to time expended, or benefit to the estate and finally expenditures may be reimbursed without the introduction of any proof. In place and instead of recognized procedures the applicant need only tender at the time of the hearing what purports to be the supporting evidence.

Thus the opinion below is in great conflict with established law and procedures of the several other circuits. However, more important, and contrary to the Act, it allows counsel for a Committee to be paid fees and reimbursements for services which duplicate the required services of the respective counsel for the trustee, the

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[13]Adopted December 4, 1967, effective July 1, 1968.

Securities and Exchange Commission, and the United States of America.[14]

Finally, this Court must invoke its supervisory jurisdiction to clarify the basic minimum and necessary limitations available to a reorganization trial court in Chapter X proceedings governing and controlling the establishing of a stockholders committee, the appointment of its counsel, the replacement of its counsel, giving consideration to the trial court's ability to supervise the activities of the committee and its counsel during the proceedings without minimizing their effectiveness by restraining such committees and their counsel in the discharging of their duties within the confines of the Act as the necessary situations arise in the administration of the estate.

Deep consideration should also be given to the limitations placed upon the committee and its counsel by the authorizations executed by the individual stockholders at the time they designated the Committee as their representatives.

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[14]§242 of the Bankruptcy Act [11 U.S.C.A. §642] specifically prohibits award of counsel fees to the attorneys or agents of the Securities and Exchange Commission and to the Commission itself. While the Act is silent as to awards for attorneys fees or other expenses involved in litigation to the United States of America, it has long been recognized that such awards of fees are with regularity not made [11 U.S.C.A. §642 (A. 173)].

Not involved in these proceedings is a situation where the court authorized counsel for the committee to discharge services required to be performed under the Act by the trustee — no order under G.O. 45 [General Orders in Bankruptcy adopted by the Supreme Court of the United States (28 U.S.C. Rules)] affecting counsel for the Committee was entered in these proceedings.

This Court's supervisory jurisdiction should be invoked to reverse the presumption attempted to be established that the Securities and Exchange Commission is an impartial governmental agency when it renders its recommendations in fee matters.[15]

The application for granting the petition for writ of certiorari addressed to the United States Court of Appeals for the Fifth Circuit therefore concerns itself with the following matters.

1. The opinion below permits an appellate court to exercise its jurisdiction where an appeal has been perfected out of time. These remarks are addressed to the appeal which the opinion below classifies as the appeal of right.[16]

Counsel for the Committee, the appellants below, failed to understand the procedures they were to utilize in exploiting the appeal.[17]

A careful reading of the record in the United States Court of Appeals for the Fifth Circuit and the opinion below establishes that a notice of appeal filed on the thirty-fifth day, without any order in the trial court extending the time within which the notice of appeal is to be filed, gave appropriate appellate jurisdiction. This

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[15]In Chapter X proceedings the Securities and Exchange Commission has unique status. While it has a right to be heard and intervene in all matters in the trial court, it cannot institute appeals of leave or of right [§§ 24 and 250 of the Bankruptcy Act (11 U.S.C. §§ 47 and 650) (A. 63, A. 175); Rule 6, F.R.A.P. (A. 183)].

[16]Cause No. 29560 assigned to said appeal by the Clerk of the appellate court below.

[17]Petition for leave to Appeal at A. 4 and A. 10.

is not the law, and is contrary to every pronouncement in this field.[18]

The provisions in the appellate rules allowing for an appeal to be perfected within sixty days subsequent to the entry of the order involved if the United States is a party, though the appellants below sought to create this impression,[19] was not applicable to these proceedings.[20]

In furtherance of the argument of the inapplicability of the sixty-day period to the instant cause, we direct attention to the applicable provisions of Chapter X of the Bankruptcy Act which prohibit the Securities and Exchange Commission [hereinafter referred to as the SEC] from commencing permissive appeals or appeals of right.[21]

It therefore is apparent that if the new Federal Rules of Appellate Procedure supercede the statutory limitation,[22] the thirty-day bar period is operative.

This Court has never ruled upon this question and it appears to be one of major importance in view of the active participation of the SEC in the many now pending Chapter X reorganization matters in the courts.

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[18]Rule 4, F.R.A.P. (A. 180); see *United States v. Robinson*, 1960, 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259.

[19]Paragraph 30 of the Petition for leave to appeal (A. 12) alleges the proper time for filing of appeals, permissive or by right, should be sixty days because the Securities and Exchange Commission was an agency of the United States Government.

[20]28 U.S.C. § 2107 (A. 175) provides: "This section shall not apply to bankruptcy matters or to proceedings under Title 11 *(official statutory reference omitted)*."

[21]§ 209 of the Bankruptcy Act [11 U.S.C. § 609] (A. 170).

[22]Rule 4, F.R.A.P. — 28 U.S.C. § 2107.

Once the appellate court classified the appeals in categories of permissive and right, it was estopped from entertaining the appeal of right which was filed out of time.[23]

Underlying the basic problem is the conflict and cross-conflict as contained in the opinions of the various Circuit Court of Appeals, creating confusion not only between the circuits but within the circuits. This conflict and confusion centers upon the distinction of the terms "proceedings in bankruptcy" and "controversies in bankruptcy". This underlying difficulty cannot be overlooked in disposing of the problem. Minute distinctions affecting appeals as a matter of right in proceedings in bankruptcy have been developed, creating greater conflict between the circuits.

The following cases will bring into focus more sharply the conflicts existing: *Georgia Jewelers, Inc. v. Bulova Watch Co.*, 5th Cir. 1962, 302 F.2d 362 [holding that an order not having definite final operative ruling is not appealable under any circumstances]; compare with *Freeman v. Seligson*, 2nd Cir. 1968, 405 F.2d 1326 [§ 21a matter[24]]; *In re Commonwealth Financial Corp.*, 3rd Cir. 1969, 408 F.2d 640, cert. denied sub nom *Thal v. Commonwealth Financial Corp.*, 1969, 395 U.S. 961, 89 S.Ct. 2104 23 L.Ed.2d 748 [question of a protective order in a Chapter X § 167 investigation[25]].

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[23] *In re TMT Trailer Ferry, Inc., Debtor, Protective Committee v. Kirkland*, supra, at 806.

[24] 11 U.S.C. § 44a.

[25] 11 U.S.C. § 567.

However, in *Cope v. Aetna Finance Co. of Maine*, 1st Cir. 1969, 412 F.2d 635 at 639, the First Circuit is in accord with the Fifth Circuit in *Georgia Jewelers, Inc. v. Bulova Watch Co., supra*, and appears to be in harmony with *Hoehn v. McIntosh*, 6th Cir. 1940, 110 F.2d 199.

Yet there are inconsistencies within the respective circuits. Examine the opinion below and compare with *Georgia Jewelers, Inc. v. Bulova Watch Co., supra*, and *City of Fort Lauderdale v. Freeman*, 5th Cir. 1952, 197 F.2d 122 at 124.

Compare opinions of the United States Court of Appeals for the Second Circuit in *Henry Ansbacher & Co. v. Klebanow*, 2nd Cir. 1966, 362 F.2d 569, and *Freeman v. Seligson, supra*, with *Lesser v. Migden*, 2nd Cir. 1964, 328 F.2d 47, and *Hotel Governor Clinton, Inc.*, 2nd Cir. 1939, 107 F.2d 398.

While the United States Court of Appeals for the Third Circuit has apparent harmony with the Second Circuit, *In re Commonwealth Financial Corp., supra*, a clear distinction within that circuit appears in *In re Imperial "400" National, Inc.*, 3rd Cir. 1968, 391 F.2d 163.

The Eighth Circuit stands with the First and Sixth Circuits, and with the Fifth Circuit when the last Circuit applies *Georgia Jewelers, Inc. v. Bulova Watch Co., supra*, and *City of Fort Lauderdale v. Freeman, supra;* see *Metal Fabricators, Inc. v. Granite City Steel Co.*, 8th Cir. 1966, 357 F.2d 175; *Standard Electronics Corporation v. Kenneally*, 8th Cir. 1964, 336 F.2d 394.

The Seventh and Tenth Circuits can be classified along with the Sixth and Eighth Circuits. [*Woodmar Realty*

Co. v. McLean, 7th Cir. 1962, 306 F.2d 479; *General Electric Co. v. Beehive Telecasting Corp.*, 10th Cir. 1960, 284 F.2d 507.[26]

All of this conflict must be examined in light of this Court's admonishment that since the passage of the Chandler Act there was a practical abolition of the distinction between appeals as of right and those by leave [*Albin v. Cowing Pressure Relieving Joint Co.*, 1942, 317 U.S. 211, 63 S.Ct. 170, 87 L.Ed. 212].

If this early pronouncement is to be reestablished and vitalized in the spirit of uniformity now prevailing in rule promulgation on all levels of litigation, how will such a doctrine be limited or expanded by the Federal Rules of Civil Procedure, where they are not inconsistent with the Bankruptcy Act,[27] and what of the applicability of the newly promulgated Federal Rules of Appellate Procedure.[28]

In view of the foregoing it is highly problematical that the portions of the October 9, 1969 order allowing **partial interim** fees and reimbursement of costs, as well

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[26]Consideration should be given to the standard principle that orders requiring or denying discovery proceedings or refusing to enter protective orders therein, are not final and therefore not appealable [*Cogen v. United States*, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275; see also 4 *Moore's Federal Practice*, pp. 1712-1715; see also as to application of said principle in bankruptcy matters — *Farrar, The Appealability as of Right of Interlocutory Discovery Orders in Bankruptcy, 23 U.Miami L.Rev. 366 (1969)*].

[27]21b of the Bankruptcy Act [11 U.S.C. 44b] and G.O. 37 [General Orders in Bankruptcy adopted by the Supreme Court of the United States; 28 U.S.C.]

[28]Rule 6, F.R.A.P. (A. 183). If it can be implied that the Federal Rules of Appellate Procedure are subject to the provisions of G.O. 37 by implication, then permissive appeals provided for in Rule 5 F.R.A.P. appeals 28 U.S.C. § 1292(b) would be controlling, thereby compounding an already irretrievabley confused situation.

as the denial of instructions and protection, were appealable.

Whether the appellant below was a proper party to urge the appeal see *In re American Mail Line*, 9th Cir. 1940, 115 F.2d 196 at 198, for an apparent conflict, a ruling that the recipient of the allowance has no standing to urge that the trial court in granting his petition wrongly exercised its jurisdiction in his favor. Abuse of discretion may be urged by such person only where the court has declined to allow him any compensation. Where the allowance is made, the recipient may only urge that it was "unreasonable". The appeal below dealt with an abuse of discretion.

2. It is basic that an appellate court, upon remand to the trial court of a Chapter X bankruptcy matter, cannot divest the trial reorganization court of its inherent jurisdiction to examine and re-examine claims and partial interim fee awards.

Subsequent to this Court's opinion and remand to the trial court, the Committee was reinstated, no reference to the 1968 opinion of this Court[29] was made at that time.

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[29]"Without in any way prejudging the issue, it is possible that when the compromises discussed in Part II of this opinion are reconsidered, and when the company is properly valued by taking into account its future prospects, the company will be found not to be insolvent. Such a finding would permit stockholders to participate. There is, therefore, no point in considering at this juncture the question presented by the petitioner concerning the stockholders' claims under the federal securities laws. Since the Committee will, of course, be entitled to participate in the new hearings on valuation and insolvency, the order of the District Court discharging it is vacated. *So doing, however, reflects no opinion on the merits of the arguments presented in this Court by petitioner as to why it should not have been discharged.*" [*TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 at 433, 88 S.Ct. 1157, 20 L.Ed.2d 1]. *Emphasis ours*

The opinion below denudes the trial court of its statutory jurisdiction to re-examine claims,[30] and is contrary to the those provisions of the 1968 opinion of this Court where this matter was aired.

A reading of the opinion below places a further limitation on the trial court's jurisdiction concerning "disqualification".[31]

3. The various Circuit Courts of Appeals have through inadvertence and error elevated the SEC to a fact-finding agency status when it participates in Chapter X bankruptcy proceedings, rather than an advisory body as designated by the Act.

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[30]§ 57k of the Bankruptcy Act [11 U.S.C. § 93k] (A. 164); *Katchen v. Landy*, 1966, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391.

[31]Counsel for the SEC in oral argument before the United States Court of Appeals for the Fifth Circuit commented upon the limitation of disqualification and suggested that the same be in accord with § 249 of the Bankruptcy Act [11 U.S.C. § 649]. Yet this Court has recognized greater grounds for disqualification than those set forth in the foregoing statute; *Wolf v. Weinstein* (1963), 372 U.S. 633 at 641, 83 S.Ct. 969, 10 L.Ed.2d 33; *Woods v. City National Bank and Trust* (1941) 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820. To appreciate the depth of disqualification, attention is called to Judge Clark's United States Court of Appeals for the Second Circuit opinion in *Finn v. Childs* (1950), 181 F.2d 431 at 444, where Judge Clark relied upon the dogma set down by this Court, when he observed that grounds for disqualification need not be limited to § 249 of the Bankruptcy Act in the following language: "Indeed it is the rule in any reorganization under Chapter X that, whenever anyone undertakes to act on behalf of any part of a class he becomes the representative of the whole class and may not deal for any part of it alone."

In view of the status of the record and the opinion below, the trial court is divested of its jurisdiction to make a full inquiry as to the effect of the ill-fated attempt of counsel for the Committee representing a stockholder [now a participant in the fee allowance as an attorney] to have her stockholder position reclassified as a general unsecured claim (A. 160), and the effect that such representation would have had on the fee application in light of the case law set forth heretofore.

Because of the unique position the SEC holds in Chapter X bankruptcy proceedings, it can never be deemed impartial.[32]

The agency is constantly seeking assistance from parties involved in Chapter X matters to lodge appeals, i.e., commence the appellate undertaking to afford the SEC voice in the appellate courts, since as we have seen, it cannot do so for itself. An analogy may be drawn to this type of undertaking with conduct which this Court frowned upon. See *Mosser v. Darrow*, 1951, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927.[33]

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[32]§ 209 of the Bankruptcy Act [11 U.S.C. § 609] (A. 170).

This Honorable Court in its 1968 opinion directed the necessity to establish the value of the debtor's business as a going concern prior to the confirmation of a plan of reorganization. [*TMT Trailer Ferry, Inc. v. Anderson, supra,* at 441.] This directive was in accordance with the Act.

After the cause was remanded to the trial court and after the hearing on the application for fees by Committee counsel was terminated, without knowledge of the reorganization court, the new Trustee or his attorney, a conference was held in the offices of the SEC in Washington, D.C., attended by representatives of the agency, counsel for the Committee, and representatives of general creditors, where the representatives of the SEC and counsel for the Committee sought to bargain a position of new stock distribution in the company, without evaluating the debtor. The bargaining terminated when the attorneys for the Committee refused to accept 25% of the new stock issue to be divided amongst pre-reorganization stockholders, leaving 75% of the issue for unsecured creditors.

The foregoing shows not only partiality by the SEC, but displays conduct which the reorganization trial court could take into consideration in fee allowance. NOTE: A happening subsequent to the hearing.

[33]While a side light to this aspect is the weight that the opinion below attributes to the efforts of Committee counsel in respect to this Court's review of 1968, this Court is in a much better position to judge in this regard. We call to the attention of this Court footnote 8 in the opinion of Mr. Justice White, *TMT Trailer Ferry, Inc. v. Anderson,* supra, at 424, wherein the opinion recognizes the ability of counsel for the SEC to succinctly state the issues.

While the adage that one cannot argue with success is universal, one must examine minutely the procedure and the method in achieving success.

The degree of this lack of impartiality is represented in the agency's defense of counsel for the Committee when the latter represented one of their number in an attempt to have her stock holdings reclassified as a general unsecured claim. The agency argued that since the issue of reclassification was not decided, no conflict or disloyalty was apparent since a determination of the issue was not had and thus at that stage of the proceedings the presentation of conflict and divided loyalty was premature [See *Wolf v. Weinstein, supra,* note 32, *Woods v. City National Bank and Trust, supra,* note 32, and *Finn v. Childs, supra,* note 32].

Thus, whether by design, omission, inadvertence, or neglect, the trial and appellate courts have bestowed upon the Commission a status not afforded by the Act, and one to which it is not entitled, since the Commission discharges its advisory capacity in a manner which does not include its own independing fact-finding investigation.[34]

There is nothing in the Congressional enactment which requires the blind acceptance of an SEC recommendation as to fees as the basis for overruling a partial interim award of a trial reorganization court, where the order making the award reserves jurisdiction to make further inquiry of the fee applicants and their activities. This portion of the opinion below places the Fifth Circuit in direct conflict with the Sixth and Eighth Circuits [See

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[34]The usual procedure in the Commission is simply this: a copy of the transcript of the hearing, along with the application and any objections, are reviewed by the attorney assigned to the case, who then makes his suggestion, which in turn is acted upon in the higher echelons in the Commission, and appropriate recommendations are thus made. Hence, the people making the recommendation are at least once or twice removed from the proceedings.

Inland Gas Corp., 6th Cir., 1962, 309 F.2d 176; *Detroit International Bridge Co.*, 6th Cir. 1940, 111 F.2d 235; *Cooke v. Bowersock*, 8th Cir. 1941, 122 F.2d 977 at 985].

Compare status of the SEC in matters other than fee applications, in relation to the requirements that the positions forwarded by the agency are only advisory, and it is not mandatory that they be accepted. [*In re American National Trust; Bradshaw v. Loveless*, 7th Cir. 1970, 426 F.2d 1059 at 1066.]

In applying the Public Utility Holding Companies Act of 1935,[35] reorganization trial courts are not required to accept fee recommendations by the SEC, even though the agency is granted a statutory right to set awards of compensation, if the agency's findings are not supported by substantial evidence [See *North American Light & Power Co.*, 3rd Cir. 1953, 202 F.2d 638; see opinions below, (1952) 106 F.Supp. 686, and (1951) 101 F.Supp. 931; also *Standard Gas & Electric Co. v. Securities and Exchange Comm.*, 8th Cir. 1954, 212 F.2d 407].

The opinion below creates greater conflict amongst the circuits and clearly express an overreaching of the application of appellate jurisdiction.

4. It appears that there has been a rule of law in the United States Court of Appeals for the Fifth Circuit that allows said court to become a trier of fact in Chapter X bankruptcy fee awards.

This has been a policy of long standing in the Fifth Circuit [*Campbell v. Green*, 5th Cir., 1940, 112 F.2d 143;

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[35]15 U.S.C. § 79k(e), (f) (A. 176).

reaffirmed *Massachusetts Mutual Life Ins. Co. v. Brock*, 5th Cir. 1969, 405 F.2d 429.]

The practice in the other Circuits where said appellate courts deem the action of the trial reorganization court inappropriate, is to reverse and remand the matter under direction [*In re Imperial "400" National, Inc.*, 3rd Cir. 1970, 432 F.2d 232 at 237; *Finn v. Childs, 2nd Cir., supra*].

Hence another conflict between the circuits since the court below, in relying upon its own expertiseness from a review of the trial record, not only overrules the trial court, but actually becomes a trier of fact and sets the fees.

It therefore is necessary to determine whether or not, in reaching the opinion below, reversible *trial error* was committed.

Therefore, this application must deal in a cursory manner with the errors committed by the appellate tribunal when it acted as a trial court.

The application filed by counsel for the Committee for fees and reimbursement of costs, to say the least, was sketchy and inadequate since sufficient detail was lacking. The opinion below held the application sufficient so that an award could be made by it.[36]

This approach is in direct conflict with the settled law in the Second, Third, Sixth, Seventh, Eighth and Ninth Circuits on this matter. [See *Chicago & West Towns*

[36]For this reason it was necessary to include in the annexed Appendix pertinent portions of the record in the trial court, which in fact actually became a part of the record in the United States Court of Appeals for the Fifth Circuit.

Railway v. Freidman, 7th Cir. 1956, 230 F.2d 364; *In re Detroit International Bridge Co.*, 6th Cir. 1940, 111 F.2d 235; *In re Kentucky Electric Power Corp.*, W.D.Ky. 1935, 11 F.Supp. 528; *Creditors Committee of Fox Markets, Inc. v. Ely.*, 9th Cir. 1964, 337 F.2d 461; *Cooke v. Bowersock, supra; Matter of Porto Rican American Tobacco Co.*, 2nd Cir. 1941, 117 F.2d 599; *In re Progress Lektro Shave Corp.*, 2nd Cir. 1941, 117 F.2d 602; *Milbank, Tweed & Hope v. McCune*, 4th Cir. 1940, 111 F.2d 100; *Hudson & Manhattan Railroad Co.*, 2nd Cir. 1964, 339 F.2d 114; *In re Imperial "400" International, Inc., 432 F.2d 232 supra.*

Again, the opinion below stresses that counsel for a stockholders committee may duplicate the services performed by the attorney for the trustee, and attorneys for the SEC and the United States of America, and such duplicate services are to be taken into consideration in the allowance of fees.

There is no basis for this radical departure from the statutes or from the law as settled in the various circuits.

To arrive at this erroneous conclusion, the per curiam opinion below bastardized the well-considered decision of Circuit Judge Clark in his opinion filed in *Finn v. Childs, supra.*

The departure commences with an observation in the opinion below that such procedures as to award of allowances of this kind is proper, [relying upon 6A *Collier on Bank.* § 13.10]. This reference to *Collier* limits compensation to duplication of services where the same occur when many representatives of small groups or individuals are involved in a Chapter X proceedings, thus duplication can-

not be avoided, citing as the basis for said narrow application *Finn v. Childs, supra.* The reading of that decision brings one to a conclusion of allowing fees in a limited manner if there is duplication by these groups. But the opinion below, while relying upon this reference in the text, fails to give any weight to another warning set forth by the same author, to wit, that services rendered which are duplications of required duties of officers of the estate or their attorneys are not compensable, even though they are beneficial to the administration of the estate. Services rendered on a voluntary basis, without obtaining court approval or direction prior to commencing said services, even though generally helpful or beneficial, cannot be compensable from the estate. The limitation further precludes compensation where services duplicate the efforts of attorneys for the agencies of the United States of America, if any there be involved in the proceedings [6A, *Collier on Bankruptcy,* § 13.02, pp. 917- 918 14th Ed.].

We now find that this particular portion of the opinion below is in conflict with the doctrine enunciated in the Second, Third, Sixth, Seventh and Ninth Circuits [See *Finn v. Childs, supra; Imperial "400" National, Inc., 432 F.2d 232 supra; Creditors Committee of Fox Markets, Inc. v. Ely, supra; Detroit International Bridge Co., supra; Chicago & West Towns Railway v. Freidman, supra.* But for an erudite discussion forbidding the award of fees for services which duplicate those rendered by other parties, two companion cases of the Second Circuit are essential reading. [See *In re Progress Lektro Shave Corp., supra,* and *Matter of Porto Rican American Tobacco Co., supra.*

Finally, the opinion below completely disregarded the right of the trial court to retain jurisdiction over the

subject matter and the parties to make a further investigation because of the new and additional facts revealed to the district court subsequent to the hearing on the application, when the supplemental statement was filed under § 210 of the Bankruptcy Act (A. 158).

5. Since the enactment of the Chandler Act amending the Bankruptcy Act in 1938, this Court has never settled the procedures to be utilized in the selection of stockholders committees, their counsel, and the limitation of such committees and their counsel, not only by the Act, but by the executed authorizations selecting the committee.

No expression has ever been made by this Court as to what limits are imposed upon said committees and their counsel as to their rights to be heard, on what particular matters they may be heard; and if such committees by their designation as parties entitled to receive notice, have in fact gained complete intervention into the proceedings.

The Court has never expressed an opinion concerning the effect of the statutory limitations as well as how stockholder authorization curtail committee activity as to voting of claims, approval of plans and confirmation of plans, wherein said facets would affect fee allowances and reimbursements to such committees and their counsel where services are performed beyond these limits.

By statute a committee is prohibited from voting a claim, and only individual creditors or stockholders or their respective attorneys can vote to confirm a plan [§ 179 of the Bankruptcy Act (11 U.S.C. § 579) (A. 167)].

The individual authorizations executed by the stockholders prohibit, in the present case, the committee, not only from voting, but from dissenting or consenting to any plan of reorganization (A. 47).

The Act clearly distinguishes between the approval of a plan and confirmation of a plan [§§ 170 and 175 of the Bankruptcy Act (11 U.S.C. §§ 570 and 575) (A. 166, A. 167)].

Thus, if committees can only participate up to approval or disapproval of a plan, and they as such are precluded from voting for or against the plan, does the demarcation in the Act prevent or preclude the committees and their counsel from objecting to confirmation of a plan and appealing an adverse ruling on confirmation. Bearing in mind that § 180 of the Bankruptcy Act [11 U.S.C. § 580, (A. 168)] reserves to the individual stockholder, an indenture trustee, a creditor and the debtor, the right to object to confirmation and the right to appeal an order of confirmation. Committees are not one of the group permitted to appeal orders of confirmation.

The statutory enactment specifically sets forth that committees and their counsel are to obtain reimbursement of costs and compensation in connection with a plan approved by the judge, whether or not accepted or finally confirmed, provided the services rendered are beneficial [§ 242 of the Bankruptcy Act (11 U.S.C. § 642) (A. 173)].

With this limitation in the statute, a committee and its counsel, though effectively resisting confirmation, act as a volunteer, is precluded from being awarded fees for such services [*In re Progress Lektro Shave Corp., supra; Matter of Porto Rican American Tobacco Co., supra*].

There is a decided difference between the right to be heard and the right to intervene in Chapter X proceedings [*Kenmore-Granville Hotel Co.*, 7th Cir. 1937, 92 F.2d 778, cert. denied 302 U.S. 767, 58 S.Ct. 481, 92 L.Ed. 596; *Flour Mills of America*, D.C.Miss. 1939, 27 F.Supp. 559].

The Committee was granted a right to be heard and to receive notices. Controry to the contention of counsel for the Committee, they were not appointed by the trial court. They were designated to receive notice for and on behalf of the Committee, and nothing more. (A. 88)[37] If this designation did not allow the Committee to intervene — for intervention usually contains a general right to intervene, or intervention on specific matters only — then what effect would this failure have on the application for fees?

While stockholders as a matter a right can be heard individually at all times,[38] committees must seek the right and the court must designate them as a party entitled to be heard and receive notice [§ 207 of the Bankruptcy Act (11 U.S.C. § 607) (A. 169)].

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[37]If counsel for a committee is appointed by the court, then replacement of such counsel is an intricate problem. Defects such as notice and an amendatory order may severely affect allowance of fees where orders substituting counsel were not applied for and obtained. On the other hand, if counsel is appointed independent of court authority, but tenure and replacement are dependent upon judicial approval, what is the effect of replacement without notification to the court in relation to fees?

[38]Provided they have filed their claims as stockholders and have been designated as parties entitled to be heard and receive notice. In this instance they are deemed intervenors.

This Court has never ruled upon the efficacy of a committee that is authorized to act for individual stockholders where the stockholders are not to be charged any costs or fees, such items to be forthcoming from the estate, and the committee itself makes no expenditure of costs, while its counsel seeks to recover an expenditure in excess of $18,000.00.

It would appear that the time is ripe for this Court to exercise its great supervisory authority to set forth clearly and distinctly the responsibilities of committees and their counsel in Chapter X reorganizations.

Counsel for the Committee deems that there is no limitation on the services they can render in these proceedings. A careful reading of their application for leave to appeal (A. 2, supra) leaves one with the impression that Committee counsel, without obtaining appropriate orders, intend and will render services which will duplicate the services of the attorney for the Trustee and for the SEC. The procedure is clear that they will seek to burden the estate with unwarranted demands for payment for such unnecessary, duplicative services. Therefore, the effect of an order of instructions will no doubt be regarded by said counsel as authorization from the trial court to render said duplicate services and be paid for the same.

Unless this Court establishes a rule of law settling the matter in accordance with the statutory limitations and judicial pronouncements banning compensation for duplication of services, even though such services be voluntary or beneficial, many estates will be burdened with payment of attorneys fees far beyond proportion.

CONCLUSION

The proceedings in the United States Court of Appeals for the Fifth Circuit must be reviewed to correct apparent errors, not only as set forth in the opinion below, but its attempt to divest the trial reorganization court of its jurisdiction must not be left undisturbed.

The existing conflict between most if not all of the circuits is magnified by the opinion below, since it contains many more departures from accepted standards. if left undisturbed its impact upon the administration of the Bankruptcy Act in Chapter X proceedings will be devastating.

A clear enunciation of the limitations of the advisory status of the SEC is required, as well as the rendition of directives to both the trial and appellate courts in regard to the effective exercise of their respective jurisdictions to prevent interference each with the other.

Hence, of necessity this Court must exercise its supervisory jurisdiction to set judicial standards and limitations to govern committees and their counsel. A complete disposition of the foregoing problems will add to a greater effective and appropriate administration of the Bankruptcy Act by the courts, in accordance with the Congressional dictate.

Dated at Miami, Florida, this 23rd day of February, 1971.

Respectfully submitted,

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